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2
3 UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re

5 Case No.

01-16034

6 ENRON CORP., et al,

(03-9266)

7 Debtors.

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8 April 27, 2005

3:03 p.m.

9 United States Custom House

10 1 Bowling Green

New York, New York 10004

11 E X C E R P T

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13 03:00 01-16034 ENRON CORP., ET AL
(03-9266) Enron Corp. and Enron North
14 America Corp. v. Citigroup, Inc., et al
15 Motion by Plaintiff for a summary
judgment subordinating the Yosemite
16 Trusts' claims against Plaintiffs'
estates.

17 Opposition by the Bank of New York filed.

18
19 B E F O R E:

20 THE HONORABLE ARTHUR J. GONZALEZ

United States Bankruptcy Judge
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A P P E A R A N C E S: (continued)

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1 Proceedings

2 (Whereupon, the following is an
3 excerpt from the proceedings taken on
4 4/27/05 in re Enron Corp., et al, Case
5 No. 01-16034; Enron Corp. and Enron North
6 America Corp. v. Citigroup, Inc., et al
7 (03-9266))

8 JUDGE GONZALEZ: Please be
9 seated.

10 Let's proceed with the motion.

11 MR. RATNER: Your Honor, Scott
12 Ratner of Togut, Segal & Segal on behalf
13 of the Enron entities.

14 If I may very briefly as a
15 housekeeping matter, I just wanted to
16 advise the Court by way of follow-up to
17 the status conference we held last
18 Thursday, I believe, we have just minutes
19 ago submitted to chambers an agreed form
20 of order regarding scheduling and related
21 matters concerning the so-called Metiom
22 issue.

23 We had reserved time today for
24 a status conference, if the parties were
25 unable to reach consensus. I am pleased

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2 to report to the Court the parties were,
3 indeed, able to reach consensus. That
4 form of agreed order was submitted just
5 moments ago. It has been filed
6 electronically in each of the nine
7 transferee litigations, as well as the
8 Megacomplaint and also served by
9 facsimile on all of the counsel of
10 record, Your Honor.

11 With that, if we could turn to
12 the subject matter of this afternoon's
13 hearing, which is part one of Enron's
14 summary judgment motion against the
15 Yosemite Trusts.

16 My colleague Richard Milin from
17 Togut, Segal will handle the argument for
18 Enron. Thank you, Your Honor.

19 JUDGE GONZALEZ: I have seen
20 the proposed order. It will probably be
21 entered when I get off the bench

22 MR. MILIN: Thank you, Your
23 Honor. Richard Milin with Togut, Segal
24 for Plaintiffs Enron and affiliates of
25 the Reorganized Debtors.

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2 Your Honor, we are here today
3 to address the first of three issues
4 raised by Plaintiffs' motion for summary
5 judgment, equitably subordinating the
6 Yosemite Trusts' claims against the
7 Plaintiffs' estates.

8 As Your Honor is aware, the
9 Yosemite Trusts had filed a complaint in
10 New York State court, now removed to
11 federal court, suing Citibank for fraud
12 and other wrongs arising out of the
13 Yosemite transactions. In their
14 complaint the Trusts allege that the
15 Yosemite transactions were, quote, a
16 massive scheme of deception designed and
17 orchestrated by Citibank, NA, and its
18 parent and affiliated entities. Through
19 this scheme, quote, Citibank raised
20 millions of dollars from the Trusts.
21 Citibank used these funds to make
22 disguised loans to Enron Corp. and its
23 affiliates in order to reduce its own
24 Enron credit risk, to prop up Enron, to
25 cover up Enron's failing financial

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2 condition, and generate significant fees
3 in the process. That is from paragraph 1
4 of the complaint.

5 Given the Trusts' admissions in
6 their complaint against Citibank and the
7 fact that the Trusts are post-petition
8 transferees of Citibank's claims against
9 Enron, Plaintiffs seek a summary judgment
10 equitably subordinating the Trusts'
11 claims based on a simple three-step
12 argument.

13 First, the Trusts' allegations
14 against Citibank are admissible in
15 evidence against them as admissions of a
16 party opponent. Absent evidence to the
17 contrary, and the Trusts point to
18 nothing, those admissions are binding and
19 mandate a summary judgment in Plaintiffs'
20 favor.

21 The second step in our argument
22 is that the Trusts allege such egregious
23 misconduct by Citibank, that if the
24 allegations are taken as true, Citibank's
25 Enron claims must be subordinated as a

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2 matter of law. The Trusts not only
3 allege that Citibank benefited itself
4 hugely at the expense of Enron's other
5 creditors, but also that Citibank's
6 conduct, quote, involved a high degree of
7 moral turpitude and demonstrated such
8 wanton dishonesty as to imply a criminal
9 indifference to civil obligations. That
10 is from paragraph 169.

11 The third step in our argument,
12 to be briefed before the second step, in
13 light of today's coordinated briefing
14 order, is that because Citibank's Enron
15 claims would be subject to equitable
16 subordination in Citibank's hands, they
17 must also be subject to subordination in
18 the Trusts' hands, because the Trusts are
19 post-petition transferees of Citibank.

20 In accord with the logic of
21 Metiom, a party cannot be permitted to
22 launder its claims just by transferring
23 them and an assignee can receive no more
24 than an assignor possessed.

25 Consequently, the Plaintiffs maintain

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2 that we are entitled to a summary
3 judgment equitably subordinating the
4 Trusts' claims.

5 Today's argument, with that
6 background and in accordance with the
7 Court's direction, will address only the
8 first of those three steps, whether the
9 Trusts' allegations against Citibank are
10 admissible against the Trusts and can
11 support a summary judgment against them.

12 Your Honor, the Trusts'
13 allegations in the Trusts' complaint can
14 and should support a summary judgment
15 against them, because there is no
16 disagreement between the parties
17 concerning the material facts. Both
18 Plaintiffs and the Trusts assert that
19 Citibank engaged in egregious misconduct
20 sufficient to require equitable
21 subordination of Citibank's claims as a
22 matter of law. Indeed, even faced with
23 the Plaintiffs' motion and the facts
24 asserted in Plaintiffs' Rule 7056-1
25 statement, the Trusts do not deny the

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2 truth of a single fact that Plaintiffs
3 assert or on which Plaintiffs' motion
4 relies. Those facts are binding on the
5 Trusts, not because of judicial
6 admissions, but because the Trusts do not
7 dispute their truth. There are, thus,
8 two grounds for holding that the
9 allegations in the Trusts' complaint can
10 support a summary judgment here.

11 First, local Bankruptcy Rule
12 7056-1 provides that if a party fails to,
13 quote, specifically controvert any facts
14 stated in the opposing party's statement
15 of undisputed fact, that fact, quote,
16 shall be deemed admitted for purposes of
17 the motion.

18 The Trusts do not specifically
19 controvert any facts in Plaintiffs'
20 statement of undisputed facts. Instead,
21 they just say they believe those
22 allegations should not bind them.

23 Second, for the reasons I will
24 now discuss, the Trusts' complaint itself
25 supports summary judgment. The

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2 allegations in the Trusts' complaint are
3 admissible in evidence, because they are
4 unquestionably admissions by a party
5 opponent under Federal Rule of Evidence
6 801(b)(2). We have cited the Zitz and
7 Rosenberg cases for that, and the text of
8 the rule also makes it clear.

9 Also the Trusts' submissions
10 are admissions on file for purposes of
11 Rule 56, and therefore can be considered
12 on summary judgment. We have cited the
13 EEOC v. Virginia Carolina for that
14 proposition. Moore's states that
15 representations to the Court are
16 admissions on file for purposes of Rule
17 56. The Stratton and the Enquip cases
18 also provide further support.

19 Further, there are at least
20 cases that grant summary judgment, based
21 on allegations in unverified,
22 unadjudicated pleadings from another
23 case. Raphelson, a First Circuit case
24 from 1986, and EEOC v. Virginia CEC,
25 which I mentioned earlier. We ask the

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2 Court to do the same thing here that was
3 done in Raphelson and in EEOC.

4 Now, the Trusts argue that the
5 decisions in Raphelson and EEOC are
6 contrary to, quote, black letter law, and
7 that summary judgment should be denied
8 here based on four technical evidentiary
9 arguments, which I will now briefly
10 address.

11 First, the Trusts argue that,
12 quote, an unverified complaint is not
13 competent summary judgment evidence.
14 That is from page 7 of their memorandum,
15 but the Trusts misstate the law. The
16 cases they cite hold only that a party
17 can't rely on its own unverified
18 pleadings in supporting or imposing
19 summary judgment. Here, Plaintiffs rely
20 only on the opposing party's pleadings,
21 and those pleadings in contrast are
22 admissions under Rule of Evidence
23 801(b)(2). Besides, Raphelson and EEOC
24 do just what the Trusts say the courts
25 can't do as a matter of black letter law.

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2 They grant summary judgment based on
3 unverified, unadjudicated rules in other
4 actions.

5 Second, the Trusts argue that
6 that is a, quote, longstanding rule that,
7 quote, allegations in a complaint that is
8 yet to be adjudicated, cannot support a
9 summary judgment. That is from their
10 memorandum at page 20. But the Trusts
11 cite no support at all for that
12 proposition, and Raphelson and EEOC are
13 to the contrary.

14 Third, the Trusts argue that
15 their complaint cannot support summary
16 judgment, because they have a right to
17 plead inconsistently or alternatively.
18 But the Trusts do not actually plead
19 inconsistently or alternatively. They do
20 not identify a single fact in the Trusts'
21 complaint that they think should not
22 bind, because it is cited differently
23 here. Also the Trusts' complaint is pled
24 emphatically and unequivocally with no
25 hesitation, not alternatively, or on

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2 information and belief.

3 In essence, the Trusts are
4 asking the Court to ignore the detailed
5 factual pleading in the Trusts'
6 complaint, because here they claim that
7 they just don't know the facts. Now,
8 that is disingenuous and to give it
9 credence would be unjust.

10 Also, the Trusts cannot plead
11 in the alternative, because pleadings are
12 governed by Rule 11 and its state court
13 analogs. A party is prohibited from
14 pleading facts that don't have
15 evidentiary support. If the Trusts knew
16 of evidence contrary to their Trusts'
17 complaint, they would have mentioned it
18 and should have mentioned it here.

19 Moreover, we believe that the
20 Trusts' complaint would be admissible
21 even if it had been pled in the
22 alternative. The Second Circuit hasn't
23 spoken concerning how to deal with the
24 admissibility of inconsistent pleadings.

25 Plaintiffs respectfully

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2 suggest, as the First Circuit did in the
3 Vincent case, that extrinsic pleadings,
4 pleadings from a different proceeding,
5 are admissible under Rule 801(b)(2),
6 unless admitting them would be more
7 prejudicial than probative under Rule of
8 Evidence 403. Here, admitting the
9 complaint would not be prejudicial,
10 because the Trusts do not assert that it
11 is in any way incorrect; and, in any
12 event, because the Trusts did not plead
13 in the alternate, the Court need not
14 address that issue on this motion.

15 The fourth and final argument
16 that the Trusts rely on is a series of
17 evidentiary arguments. They say that
18 their complaint is inadmissible because
19 it contains hearsay and because it is not
20 based on personal knowledge, because it
21 makes assertions about third-party state
22 of mind, and states conclusions. They
23 don't identify any particular
24 allegations, I think, that actually meet
25 those descriptions, but in any event,

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2 Rule of Evidence 801 speaks point blank
3 that admissions by a party opponent are,
4 quote, not hearsay.

5 Also treatises, Second Circuit
6 case law, and even the Official Advisory
7 Committee notes and unanimously state
8 that admissions can be used in evidence,
9 even if they are not based on personal
10 knowledge. Similarly, treatises and case
11 law, which are cited in our motion
12 papers, say that omissions cannot be
13 excluded from evidence merely because
14 they state conclusions or because they
15 concern a third party's state of mind.

16 All of the Trusts' evidentiary
17 arguments, therefore, like their other
18 arguments, are without merit. For these
19 reasons, Your Honor, the allegations in
20 the Trusts' complaint are admissible in
21 evidence, they are binding because they
22 are uncontradicted, and they are
23 sufficient to support summary judgment.
24 Plaintiffs' motion for summary judgment
25 should be granted.

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2 Thank you, Your Honor.

3 JUDGE GONZALEZ: Thank you.

4 MR. FAY: Your Honor, Michael
5 Fay for the Trusts. Your Honor, I would
6 like to start with the notion that it is
7 absolutely assumed throughout all of the
8 Debtors' papers that these are
9 admissions. It is the burden of the
10 Debtors to show that these allegations in
11 the complaint are admissions. They
12 haven't met that burden, because they
13 have virtually ignored Rule 8(e)(2),
14 which allows inconsistent, alternative,
15 or hypothetical pleadings. Their only
16 argument as to Rule 8(e)(2) is that they
17 don't see alternative language or some
18 kind of magic language. They haven't
19 cited any language to this Court or any
20 case law that suggests that there have to
21 be magic words. We haven't even
22 responded yet to the fourth amended
23 complaint here, so they don't know what
24 we are going to say as to their claim
25 under count 73(a) as equitable

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2 subordination. We may say if in the
3 state court action, which is now in
4 Houston, Citigroup is deemed not to have
5 engaged in inequitable conduct and not to
6 have committed fraud, then we allege that
7 the Debtors owe us here. That is
8 absolutely at the core of what Rule
9 8(e)(2) allows.

10 The Breeden case that we cited
11 to you, in that case Judge Gerling from
12 the Northern District, says, "No. A
13 Trustee in a bankruptcy can have two
14 separate adversary proceedings with
15 inconsistent theories until there is a
16 judgment."

17 The only response that the
18 Debtors have to the Breeden case is this
19 sophistry that somehow or another they
20 are arguing evidentiary admissions, and
21 the Breeden case and Judge Marrero in the
22 Banks case, they are talking about
23 judicial admissions. That in this
24 context is a distinction without any real
25 meaning. The only reason the Debtors

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2 filed this motion for summary judgment --
3 and they told you that, Your Honor, I was
4 here and I heard them say -- was because
5 they know that given the fact that the
6 Trusts have two alternative theories, we
7 couldn't deny, we couldn't put on
8 evidence to say these allegations are
9 false. That is why 8(e)(2) exists.

10 Every authority they cite, when
11 they discuss 8(e)(2) and why it was
12 adopted, it was to prevent parties who
13 had alternative theories from being put
14 in the bind, whether you call it an
15 evidentiary admission or a judicial
16 admission, it has the same effect. Just
17 like Judge Marrero said in the Banks
18 case, an allegation about the state of
19 mind or some legal conclusion as to a
20 third party should not become established
21 fact in a case. That is what these
22 Debtors want. They want what we said
23 about Citigroup to become established
24 fact in this case, and this distinction
25 they try to draw between evidentiary

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2 admissions and judicial admissions
3 doesn't exist. Wright & Miller, which
4 they cite at section 7026, says: Since
5 the purpose of alternative pleadings is
6 to enable a party to meet the
7 uncertainties of proof, policy
8 considerations demand that alternative
9 pleadings cannot be admitted either as an
10 admission of a party opponent or for
11 purposes of impeachment. You can't do
12 it.

13 If they are allowed to proceed
14 with this motion for summary judgment,
15 Rule 8(e)(2) is eviscerated. Again, the
16 only response they have as to 8(e)(2) as
17 well, we don't see the word "alternative"
18 or the word "hypothetical." When we
19 filed the state court complaint, we
20 didn't even know about count 73(a), which
21 was filed in January of this year, and we
22 haven't responded to it yet.

23 JUDGE GONZALEZ: When are you
24 supposed to respond to it?

25 MR. FAY: July 1st, Your Honor.

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2 At the very least, this is really
3 premature. They are moving for summary
4 judgment on an account we haven't even
5 responded to. They don't know what we
6 are going to say. Again, there is no
7 case law that says you have to have magic
8 words, but if there are some magic words,
9 we haven't done it yet.

10 We cite in support of our
11 position and they cite in support of
12 their position this case Enquip. It is a
13 good case. It has a good discussion of
14 some of the issues here. What happens in
15 Enquip? Somebody moves for summary
16 judgment, the exact same situation. This
17 party in responding to a counterclaim
18 says that certain specifications on some
19 equipment weren't met, but it goes into
20 state court and files a separate action
21 and it says that the specifications were
22 met because it is like a cross-claim.
23 Another party comes in and moves for
24 summary judgment, and the Seventh Circuit
25 says: Statements in a complaint in a

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2 pleading can be admissions." But wait a
3 minute. That is not the end of the
4 story. That is the end of the story for
5 the Debtors. If they are in the
6 complaint, they are admissions. But that
7 is not the end of the analysis. What
8 they said in Enquip was: "Look, the
9 non-movant on the summary judgment motion
10 showed you that this is a hotly contested
11 issue. He showed you evidence that this
12 is alternate pleadings." In that
13 situation, you can't willy-nilly call
14 these things admissions. We have done
15 the same thing. This is clearly
16 alternative pleadings.

17 The very same allegations that
18 are made against Citigroup in the state
19 court complaint have been made against
20 JP Morgan with respect to similar prepaid
21 transactions. There was a trial in
22 England last year and JP Morgan won.

23 My client certainly believes in
24 their allegations against Citigroup, but
25 there is no guarantee that those

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2 allegations are going to result in a
3 finding of fraud or inequitable conduct.
4 That is why we have this alternative
5 pleading standard. Because if Citibank,
6 even under their theory, accepting their
7 theory, if Citibank didn't engage in any
8 inequitable conduct, if it didn't engage
9 in fraud --

10 JUDGE GONZALEZ: If Citibank
11 didn't or did?

12 MR. FAY: Didn't. If there is
13 no inequitable conduct here. In England
14 the Judge said, "These transactions are
15 fine." We all disagreed, but that was
16 the finding. We just can't assume that
17 these are right, and that is what Judge
18 Marrero in the Banks case is saying and
19 in the Borecki case from New Jersey.
20 What those judges are saying, and again
21 the only response the Debtors had to
22 those cases was that was judicial
23 admissions, but here it all has the same
24 effect. Calling it an evidentiary
25 admission doesn't change the effect,

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2 which is that we lose one of our
3 alternative causes of action. What Judge
4 Marrero said and what the Judge in the
5 Borecki case said is when you are saying
6 something about somebody, that shouldn't
7 become an established fact. When you are
8 just alleging that this is the way it is,
9 that shouldn't become an established
10 fact. That is what is going to happen
11 here. If they win this motion just
12 because we said in good faith, relying on
13 public documents, with the Examiner's
14 report and things like that, just because
15 we said that Citigroup engaged in fraud
16 or inequitable conduct, that establishes
17 that fact for all time. This notion
18 that, well, we could have come in and we
19 could have contradicted it, again, that
20 is just sophistry in this context. They
21 cite cases where that could very well be
22 a fair policy. They cite cases where it
23 looks like maybe there was some
24 alternative pleading, but then one of the
25 counts is resolved. So the light was

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2 green, the light was red. The light was
3 green. Now, in the lawsuit where the
4 light was red, you have got to explain
5 that allegation. Then it comes in as an
6 evidentiary admission. Then you can
7 show, "Okay, yes. At point we thought it
8 might have been green, but now we are
9 absolutely convinced it was red." In
10 that situation the policy considerations
11 of 8(e)(2) don't apply.

12 But we are just beginning these
13 two lawsuits, and to take our allegations
14 and to say from this point forward that
15 that dispositively renders judgment on
16 our claim here, our claim in this
17 bankruptcy court, Rule 8(e)(2) is gone.
18 It just doesn't exist anymore.

19 This argument based on the
20 First Circuit decision that somehow or
21 another you can actually view these
22 allegations through Rule 403 as to their
23 probative versus their prejudicial
24 effect. What we are dealing with in the
25 Vincent case is allegations from a prior

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2 case. This is not an alternative
3 pleading situation. It is not this
4 situation. Vincent does not address the
5 situation we have here, two very immature
6 claims where we have a defense as to one
7 claim and we have a claim in another
8 action and no alternatives and they fit
9 perfectly within 8(e)(2).

10 JUDGE GONZALEZ: Spend a few
11 minutes to explain the alternatives to
12 me. What is the primary position?

13 MR. FAY: The primary position
14 is that if Citigroup is not liable to us,
15 then the Debtors are off.

16 JUDGE GONZALEZ: Say that
17 again?

18 MR. FAY: If Citigroup is not
19 liable to us under the state court
20 complaint, if it is found that, no, they
21 didn't commit any fraud, so the monies
22 that are owed to Trusts, Citigroup
23 doesn't have to pay us. Then we have a
24 claim here in the bankruptcy court. If
25 we collect against Citigroup and are made

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2 whole, obviously our claim here in the
3 bankruptcy court wouldn't matter.

4 Under the terms of these
5 documents, "You, the Debtors, you owe us.
6 But we think we got into this situation
7 because of fraud over here. So if there
8 is fraud over here, so be it, but, if
9 not, you owe us." That is classic
10 alternative pleading. That happens all
11 the time, particularly in cross-claims.

12 One of the case we cited,
13 "There is conspiracy, but if there was,
14 you were a participant in it."
15 Cross-claims. "I don't owe you any
16 money, I didn't do anything wrong. But
17 if I did, you have to pay me." It is
18 classic alternative pleading.

19 As for Rule 11, the concept
20 that we can't plead in the alternative
21 because of Rule 11, that is simply
22 incorrect. People plead in the
23 alternative constantly. Rule 11 requires
24 that we have a reasonable basis, a good
25 faith basis for what we are doing. We

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2 have read the Examiner's report. We have
3 seen the transcripts from the Permanent
4 Subcommittee on Investigations about
5 these prepaid transactions. That can
6 support a claim, like we brought in the
7 state court action. That is not
8 violating Rule 11, but we also know --
9 and, once again, as evidenced by this
10 case last year in England -- that may not
11 be a successful claim. We think it will
12 be and we believe in it, but it may not.

13 So to say that that alternative
14 pleading violates Rule 11, I don't see
15 it. There is a firm basis in both parts
16 of our position.

17 To conclude, Your Honor, the
18 cases that the Debtors cite in support of
19 their positions simply do not involve
20 alternative pleading. The EEOC case that
21 they rely upon, in that case the
22 plaintiff brings a claim for
23 discrimination. Her employer immediately
24 runs out and sues her for defamation.
25 The defamation action is used as evidence

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2 of retaliation. It has got nothing to do
3 with alternative pleading.

4 In the Raphelson case, an
5 insurance company not only in the
6 complaint, but in letters, admits that it
7 has adjusted the claim and admits that it
8 owes the money, and then tries to say,
9 "No. Actually we think we now have some
10 defenses." These are not alternative
11 pleadings cases. They are not Rule
12 8(e)(2) cases.

13 We respectfully submit, Your
14 Honor, when you look at those cases and
15 you look at all the authorities on Rule
16 8(e)(2), these are not admissions. They
17 can't be admissions, or you eviscerate
18 that rule.

19 Thank you, Your Honor.

20 JUDGE GONZALEZ: Thank you.

21 MR. MURPHY: Good afternoon,
22 Your Honor. My name is Jim Murphy. I
23 represent the Unsecured Creditors'
24 Committee, which, as Your Honor knows is
25 the Joint Task Force that has been

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2 coordinating with the Debtors.

3 I rise this afternoon, Your
4 Honor, to speak in support of the motion
5 for summary judgment and to support the
6 arguments that the Debtors have made.

7 Your Honor, you can look at a
8 complaint in New York and there is no
9 alternative pleading there whatsoever.
10 The reality here, Your Honor, is that the
11 Trusts have had at two different
12 opportunities a choice to make, and they
13 have made a calculated choice at both
14 junctures. They have done so, because
15 they perceived it is in their interests
16 to do that.

17 The first choice they made was
18 when they filed the New York complaint.
19 That complaint is an effort to have one
20 hundred percent of their losses be paid
21 by Citigroup. In making that claim, they
22 asserted forthwith without equivocation
23 the wrongs that they think Citigroup had
24 done. As Mr. Milin quoted from just the
25 first paragraph of that complaint, what

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2 was alleged was direct and devastating.

3 The Trusts face a second
4 choice, Your Honor. They fact it as they
5 must in responding to this motion for
6 summary judgment. They had the
7 opportunity then to come in and refute
8 and deny the admissions that they made
9 and the allegations that they made in the
10 New York complaint. They deliberately
11 chose not to do that. Your Honor, they
12 did that and their strategy is plain.
13 They want to get one hundred percent
14 dollars from Citi.

15 So the motion facing Your
16 Honor, and, Your Honor, we respectfully
17 suggest has to take the pleadings as they
18 are today. The pleading as they are
19 today are unequivocal, and they are
20 admissions made by the Trusts against
21 their interests for all of the reasons
22 Mr. Milin said.

23 Your Honor, there is one other
24 thing. It is one thing to talk about an
25 alternative pleading, and that is to say

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2 Mr. Fay said a few times alternative
3 theories of recovery. It is quite
4 another to say they engaged in
5 alternative fact statements. That is,
6 saying something is true in one place and
7 then denying it in another. They have
8 not engaged in alternative fact pleading,
9 and it is alternative fact pleading that
10 constitutes the basis for the admission.

11 Thank you very much, Your
12 Honor.

13 MR. MILIN: Thank you, Judge.
14 In light of Jim's comments, I have very,
15 very little to add.

16 I would like to point out that
17 the Trusts have answered the complaint
18 twice already, maybe more, but certainly
19 twice. It is not like we are waiting for
20 a first response.

21 Secondly, for all the talk of
22 this being a classic alternative
23 pleading, it is not. In fact, there is
24 no alternative pleading like this. They
25 don't cite one. We haven't seen one.

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2 JUDGE GONZALEZ: What do you
3 think they should have done? That is
4 what I am a little puzzled about. You
5 have an entity that received claims.
6 They are not very happy about having
7 received those claims, and they feel that
8 the entity that transferred them somehow
9 deceived them. They said, "You deceived
10 us when we entered into this, and
11 therefore you should only just give us
12 what the claims would bring, but you
13 should make us whole." But there is the
14 possibility that they will not be able to
15 establish that they were deceived, and
16 they end up with the claims.

17 Now, how would you envision
18 they could protect themselves by being
19 able to at least collect the claims and,
20 by the same token, preserve their right
21 to seek full satisfaction, if they are
22 able to establish that there is something
23 inappropriate about getting them involved
24 in this transaction or however the phrase
25 would be articulated in their complaint

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2 against Citigroup?

3 MR. MILIN: Your Honor, I
4 really think that the Trusts could have
5 done something rather simple, which is to
6 tell this Court, "Here are the facts we
7 are not sure about. Here are the facts
8 we are not sure about. We should be
9 allowed to take discovery with respect to
10 those facts, and summary judgment
11 shouldn't be entered until we have had
12 that discovery." That is not what the
13 Trusts did. I believe it is not what the
14 Trusts did, not merely for strategic
15 reasons, but because the Trusts were
16 involved in these transactions from the
17 beginning. They know the facts. They
18 are not just guessing. They pled what
19 they believed to be true.

20 They easily could have
21 submitted an affidavit under Rule 56 or
22 somehow brought to this Court's attention
23 what it was that they thought was a
24 factual issue here. Your Honor, there
25 are many things in that complaint that we

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2 all know they wouldn't disagree with. It
3 can't all be ignored as an alternative
4 pleading. The question is: what do they
5 disagree with? What do they think?

6 JUDGE GONZALEZ: What happens
7 if they just state they don't disagree
8 with anything, but they recognize there
9 is a risk that the Court may not agree
10 with them. How do they protect against
11 that risk?

12 MR. MILIN: I believe that the
13 way they would do that is point to the
14 facts that would determine the decision
15 in one way or the other. If the facts
16 are certain here, I don't think that
17 there is any risk in the alternative of
18 their being denied a remedy.

19 Furthermore, I believe that if
20 they were to recover against us, that
21 recovery would be deducted from the
22 recovery against Citibank.

23 JUDGE GONZALEZ: I think the
24 risk is the opposite. That they don't
25 recover against Citibank, but nonetheless

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2 the admissions support a finding of
3 equitable subordination on the claim and
4 then they take the claim, and if the
5 Court were to find that they are tainted
6 by the admissions regarding Citigroup's
7 conduct?

8 MR. MILIN: I am sorry? The
9 risk?

10 JUDGE GONZALEZ: The risk is,
11 if Citibank prevails. However, prior to
12 that, they are found to have admitted for
13 purposes of this summary judgment motion
14 that Citibank's conduct was inappropriate
15 and that equitable subordination based on
16 that conduct is warranted, and the Trusts
17 as having received the claims, received
18 them with the same taint that they had in
19 the hands of Citibank under that theory.
20 Then it turns out that Citibank, as I
21 mentioned, ultimately prevails. What I
22 am a little bit puzzled about is how
23 would someone protect themselves from
24 that?

25 MR. MILIN: Your Honor, I

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2 believe that that is not an issue for
3 today and that it does have solutions.
4 The Debtors are currently formulating
5 their view, but certainly the ruling on
6 the evidentiary issue would not require a
7 risk of inconsistent decisions. As to
8 the rest, as I said, both in terms of the
9 long relevant facts, I believe could have
10 protected themselves.

11 MR. FAY: Very quickly, Your
12 Honor, as to the first gentleman who
13 spoke, counsel for the Creditors'
14 Committee, it expressly states that the
15 kind of choice that counsel said we made,
16 we don't have to make. The present
17 practice under Rule 8(e)(2) permits
18 parties to seek inconsistent remedies.
19 We don't have to at this juncture make
20 that choice. That is what the rule does.
21 You used to have to make that choice.
22 You used to under common law practice, it
23 was considered dishonest to have
24 alternative pleadings. But the drafters
25 of the federal rules said, "No. We are

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2 not going to follow that rule anymore."

3 So we don't have to elect at this point.

4 The second point is the facts
5 that we are unsure about. We have stated
6 in our papers, what they rely on, nobody
7 denies that Citibank entered into these
8 various prepaid transactions with Enron.

9 That is not in dispute. The question is:
10 what was Citibank's state of mind?

11 Fraud, intent to deceive, these are
12 things that all of the facts we have
13 looked at, you can reach the reasonable
14 conclusion that that is what was going
15 on. But as you point out, Your Honor, a
16 jury or a judge might not agree.

17 So how do we protect ourselves?
18 It is impossible to protect yourself, if
19 we throw away Rule 8(e)(2). Counsel
20 couldn't come up with any. Essentially
21 what counsel was saying is, "We should
22 put on evidence showing that maybe
23 Citibank didn't have an intent to
24 deceive. Maybe Citibank did engage in
25 fraud." Just take Rule 8(e)(2) and throw

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2 it away, because it must mean nothing, if
3 we have to make that kind of showing. It
4 is exactly why this rule was adopted, so
5 that we do not have to face
6 inconsistencies or alleged
7 inconsistencies and alternative pleading.
8 That is what has happened here.

9 Thank you, Your Honor.

10 JUDGE GONZALEZ: Is there
11 anything further?

12 MR. MILIN: No, Your Honor.

13 JUDGE GONZALEZ: All right.
14 Thank you. I will take it under
15 advisement.

16 Mr. Ratner, you should probably
17 address this --

18 MR. RATNER: Your Honor, I
19 think that Mr. Murphy had one point.

20 JUDGE GONZALEZ: I think we
21 have to get this straightened out with
22 the Committee. You and the Debtors need
23 to coordinate your positions before you
24 come here. This doesn't make any sense
25 to me. If you are going to put on an

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2 affirmative case in support of the
3 motion, then you follow the Debtors, if
4 you address the Court at all. But it
5 doesn't make sense for the Debtors to put
6 on a case and for the Trusts to respond,
7 and for the Committee to get up, and for
8 the Debtors to get up, and for the Trusts
9 to respond. It is illogical to me.

10 Make your statement and I will
11 give the Trusts an opportunity to respond
12 to it.

13 MR. MURPHY: Your Honor, the
14 issue here -- and I understand your
15 admonition -- the issue here does go
16 beyond whether the Trusts were deceived
17 by Citibank. The Trusts' complaint says
18 that Citibank deceived all of Enron's
19 creditors and harmed Enron's creditors as
20 a whole. That is the reason why we are
21 here and the Debtors are here on the
22 motion for summary judgment with respect
23 to equitable subordination.

24 This is not a situation, Your
25 Honor, where the Trusts in responding to

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2 a complaint or even in making a single
3 complaint themselves, plead alternative
4 theories based on what they say in their
5 pleading. This is a case where the
6 Trusts voluntarily on their own
7 initiative went after Citibank and made
8 the admissions that they did.

9 We think, Your Honor, under the
10 Federal Rules of Evidence they are bound.
11 Thank you, Your Honor.

12 JUDGE GONZALEZ: The Trusts?

13 MR. FAY: Your Honor, just one
14 thought. Rule 8(e)(2) doesn't require
15 that alternative pleadings be in one case
16 and the case law doesn't either, and it
17 is obvious why. There are going to be
18 situations where you can't do everything,
19 but it does raise a notion. What if on
20 July 1st when we respond and we file a
21 cross-claim against Citibank, and just
22 take the state court action and stick it
23 in a cross-claim? I assume it would be
24 severed and sent to Houston, and we would
25 be in absolutely the same situation.

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2 Thank you, Your Honor.

3 JUDGE GONZALEZ: I am going
4 back to the question I was going to ask
5 before. Mr. Ratner, I haven't looked at
6 the order that you presented, but what is
7 the next date in that order, or is it
8 triggered by a decision on this motion?

9 MR. RATNER: No, Your Honor.
10 The next date pursuant to that scheduling
11 order is May 20th. It is not triggered
12 by the Court's ruling on this particular
13 issue, because the issue has been joined,
14 so to speak, on Metiom by reason of the
15 two motions to dismiss that have been
16 filed by Springfield and Oaktree in
17 related but different adversary
18 proceedings.

19 JUDGE GONZALEZ: All right.
20 Thank you.

21 (Time noted: 3:47 p.m.)
22
23
24
25

C E R T I F I C A T E

STATE OF NEW YORK)

: SS:

COUNTY OF NEW YORK)

I, DEBORAH HUNTSMAN, a Shorthand
Reporter and Notary Public within and for
the State of New York, do hereby certify:

That the within is a true and
accurate transcript of the proceedings
taken on the 27th day of April, 2005.

I further certify that I am not
related by blood or marriage to any of
the parties and that I am not interested
in the outcome of this matter.

IN WITNESS WHEREOF, I have
hereunto set my hand this 28th day of
April, 2005.

DEBORAH HUNTSMAN

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